

COMPLIANCE BOARD OPINION NO. 99-5
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June 22, 1999

Ms. Barbara Stinnett

The Open Meetings Compliance Board has considered your complaint regarding an alleged violation of the Maryland Open Meetings Act by three members of the Board of County Commissioners of Calvert County. For the reasons set forth below, the Compliance Board finds that the Act was not violated on one particular occasion, involving a private citizen's desire to be appointed to an office. The Compliance Board cannot reach a conclusion whether the Act was violated on other occasions.

I

Complaint and Response

Your complaint alleged that three members of the five-member Board of County Commissioners "have been meeting at the courthouse ... each Monday night for the past two months." These meetings, your complaint continued, "take place after the regular hours of business, when the courthouse is closed and locked. No one may enter without a key, which means that neither the public nor press can access the facility." Your complaint then related your perceptions when you yourself came to the courthouse late on a Monday evening:

The three Commissioners were seated in the same room (the office of one of them) talking. I entered my office and they moved into their own offices. One came into my office, sat down, and immediately began discussing an agenda item. It was clear that his had been discussed by the others and that a determination/decision had been agreed upon.

In a timely response on behalf of the Board of County Commissioners, County Attorney Emanuel Demedis, Esquire, denied that three commissioners regularly met in private to discuss public business. According to Mr. Demedis, the regular practice involves a Monday evening meeting between Commissioner Linda L. Kelley, the Board President, and the County Administrator. "Occasionally, Commissioner David Hale, the Board Vice President, will join the meeting." Mr. Demedis also reported two instances in which three

commissioners were together after hours on a Monday evening. The first is described as follows: “During one of the meetings at which Commissioners Kelley and Hale and [the County Administrator] were present, Commissioner John Parran joined the three. The meeting continued with little involvement from Commissioner Parran. After a short time, he left the room. During his presence in the room, the conversation remained on the agenda for the next day’s business. The Board members did not discuss the agenda items in a substantive way.”

The other instance began when Commissioner Hale had arranged an appointment with a private citizen who was seeking a position on the Planning Commission and wanted to discuss its functions. While waiting for the citizen, Commissioner Hale was joined by Commissioner Parran. Then the citizen arrived, “and the three engaged in small talk.” Commissioner Parran intended to leave, but before he could do so, Commissioner Kelley arrived. “She too stopped in Commissioner Hale’s office to say hello to the citizen, who was an acquaintance of Commissioner Kelley’s. More small talk ensued. In a few moments, Commissioner Stinnett entered the office suites. Commissioner Kelley noticed her arrival and left Commissioner Hale’s office to speak to her. At about the same time, Commissioner Parran made his exit. The entire encounter lasted only a few minutes.”

II

Analysis

In its statement of public policy, the Maryland Open Meetings Act expresses a commendably broad commitment to the values of open government. For example, in §10-501(b)(1) of the State Government Article, the General Assembly observed as follows: “The ability of the public, its representatives, and the media to attend, report on, and broadcast meetings of public bodies and to witness the phases of the deliberation, policy formation, and decision making of public bodies ensures the accountability of government to the citizens of the State.” If this sweeping declaration were the whole of the law, it would be easy to decry the practice of a quorum of public officials meeting behind locked doors.

Yet, the issue is not so simple, because the operational detail in the Open Meetings Act creates limits on its scope not suggested by the broad principles. So, under some circumstances, a quorum of public officials may meet behind locked doors without violating the Act.

The key question is whether the Act applies. For the Act to apply to a gathering of a public body, three things must be true: a quorum must be convened, §10-502(g) and (k);

the quorum must be engaged in “consideration or transaction of public business,” rather than “a chance encounter, social gathering, or other occasion that is not intended to circumvent [the Act],” §10-502(g) and 10-503(a)(2); and the discussion must involve a function that is covered by the Act, rather than an excluded from it, §10-503.

The first of these statutory ground rules means that, when Commissioners Kelley and Hale get together to discuss the upcoming meeting agenda, they are free to talk about whatever they want without notice to the public or affording members of the public and opportunity to observe. Their discussion, not involving a quorum, is not subject to the Act. *See, e.g., Compliance Board Opinion No. 96-1 (March 4, 1996), reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board 151.*

The second ground rule means that three or more Commissioners can have a discussion if it amounts to no more than social “small talk,” which is how Mr. Demedis characterized the conversation that occurred with the private citizen who had come to meet Commissioner Hale. Of course, this citizen was there to talk about the Planning Commission, and it would be unsurprising if some of the “small talk” went beyond social niceties to a discussion of the citizen’s potential service on the Planning Commission. Even had that type of conversation occurred among the three Commissioners and the citizen, however, the Act likely would not have applied, because of the third statutory ground rule: Some topics of discussion are excluded from the Open Meetings Act.

The pertinent exclusion is for the “executive function.” As we have previously ruled, the process by which a public body itself makes an appointment (as distinct from the process of considering the confirmation of an appointment made by someone else) is an executive function not covered by the Act. *See Compliance Board Opinions No. 97-14 (August 22, 1997), reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board 252 and No. 95-5 (October 18, 1995), reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board 123.* Therefore, even if the discussion among the three Commissioners had involved the prospective appointment, the Act was not violated.

We are unable to say whether the executive function exclusion also excused compliance with the Open Meetings Act when Commissioner Parran joined Commissioners Kelley and Hale during their discussion of forthcoming agenda items. As Mr. Demedis pointed out, “none of the persons in the room can remember the agenda items discussed while Commissioner Parran was present. It is therefore impossible to determine if a violation occurred since the items may have concerned matters falling within their executive functions.” Indeed, in a commissioner form of county government, in which the Board of County Commissioners has substantial administrative responsibilities, many items on an agenda probably would fall within the executive function exclusion. *See, e.g., Compliance*

Board Opinion No. 97-16 (December 2, 1997) *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 261.

Some items on the agenda, however, might involve a legislative or quasi-legislative matter that is covered by the Act, rather than excluded from it. If such an item had been discussed, even in a preliminary way, by Commissioners Kelley and Hale with Commissioner Parran present and able to participate, should he have chosen to do so, then the Act was violated. The Compliance Board lacks sufficient information to reach a conclusion one way or the other.

In closing, the Compliance Board notes Mr. Demedis' statement that "the members of the Board of County Commissioners are mindful of the importance of adhering to the Open Meetings Act and avoiding the appearance of impropriety. To this end, Commissioner Hale had made the commitment to absent himself from any situation wherein Commissioners Hale, Parran, and Kelley find themselves in the office suite together at any time. It is hoped that this procedure will dispel the notion that secret meetings are occurring." The Compliance Board commends this efforts to avoid the presence of a quorum under circumstances that inevitably would raise significant questions about adherence to the Act.

OPEN MEETINGS COMPLIANCE BOARD

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